No. 96-1581

In The

Supreme Court of the United States

October Term, 1996

STATE OF SOUTH DAKOTA,

Petitioner,

v.

YANKTON SIOUX TRIBE, a federally recognized tribe of Indians, and its individual members; DARRELL E. DRAPEAU, individually, a member of the Yankton Sioux Tribe,

Respondents,

and

SOUTHERN MISSOURI WASTE MANAGEMENT DISTRICT, a nonprofit corporation,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENTS YANKTON SIOUX TRIBE AND DARRELL E. DRAPEAU

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STATEMENT OF THE CASE

The question for this Court is whether the United States Court of Appeals for the Eighth Circuit was correct in ruling that the boundaries of the Yankton Sioux Reservation were not disestablished by Congress' enactment of an 1894 statute which purchased unallotted reservation lands for re-sale to white settlers.

A. Procedural background.

Unlike most boundary cases that come before this Court, this case had its genesis, not in a criminal action, but in an environmental dispute.

The case arose when a four county consortium in south-central South Dakota, Southern Missouri Waste Management District (hereafter "Southern Missouri") proposed construction of a landfill on private fee land within the boundaries of the Yankton Sioux Indian Reservation, boundaries which were established by the Treaty of 1858. 11 Stat. 743 (1858). Over the Tribe's objection, the South Dakota Board of Minerals and Environment issued a permit to Southern Missouri to proceed with the landfill.

The Tribe thereafter filed this action in the District Court for the District of South Dakota seeking an injunction to prevent the construction of the landfill, as well as a declaration that federal environmental regulations rather than the weaker state regulations should be applied to the proposed site.[1]

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[1] The Tribe also contended that EPA had permitting authority over the Yankton Sioux Indian Reservation, and had not given such authority to the State. *See* JA 25.

JA 21-37.[2] Southern Missouri brought the State of South Dakota (hereafter "State") into the action as a third-party defendant. JA 76. The State claimed that the Reservation had been disestablished by the 1894 Act, 28 Stat. 286, 314 (1894).[3] JA 86.

After a five-day trial the District Court held that Congress did not intend to disestablish the 1858 Treaty boundaries of the Yankton Sioux Indian Reservation (hereafter "Reservation"). *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 890 F.Supp. 878 (D.S.D. 1996); App. 84. The State appealed the trial court's ruling on the boundary issue and the United States Court of Appeals for the Eighth Circuit affirmed. *Yankton Sioux Tribe v. Southern Missouri Waste Management District*, 99 F.3d 1439 (8th Cir. 1997); App. 1. The Eighth Circuit held that Congress did not intend to disestablish the Reservation boundaries, and, as well, the Act intended to preserve the boundaries of the Reservation. App. 21, 27. After a thorough examination of all the relevant factors, the Eighth Circuit concluded that "Congress intended by its 1894 Act that the Yankton Sioux sell their surplus lands to the government, but not their governmental authority over it," and held that the 1858 Treaty boundaries were to be maintained. App. 43-44.

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[2] As used herein, "App." refers to the Appendix to the Petition for Writ of Certiorari; "Resp. App." refers to the Appendix to the Respondents' Opposition to Petition for Writ of Certiorari; "JA" refers to the Joint Appendix; "T" refers to the transcript at trial.

[3] The 1894 Act ratified a negotiated agreement between the government and the Yankton Sioux Indians which had been executed by the parties in 1892. Throughout this Brief, the 1892 Agreement and the 1894 Act are referred to as the 1894 Act.

Shortly thereafter, the South Dakota Supreme Court ruled in *State v. Greger*, 559 N.W.2d 854 (S.D. 1997), App. 125, that the Reservation had been disestablished.[4] This Court then granted the State's petition for a writ of certiorari to review the Eighth Circuit's decision.

B. Historical facts prior to the 1858 Treaty.

According to the earliest records dating from the beginning of the Eighteenth Century, the Yankton Sioux Tribe (hereafter "Tribe") held aboriginal title to thirteen million acres of land between the Des Moines and Missouri Rivers in the North-Central plains. T. 34-35; JA 571-72, 575. The lands of the Yankton Sioux have never been in, or a part of, the public domain and the Tribal government of the Yankton people has existed from the origins of the Tribe. JA 534-44. From the negotiation of the first Yankton Treaty in 1815 to the present, a government-to-government relationship has existed between the Yankton Sioux Tribe and the United States, and it is well established that the Yanktons have been the most peaceful of the Sioux tribes. JA 537-42, 567.

C. The 1858 Yankton Sioux-United States Treaty.

Under the terms of the 1858 Treaty between the United States and the Yankton Sioux Tribe, the Tribe

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[4] Although the State was a party in *State v. Greger*, the Tribe was not. This appeal is the Tribe's first opportunity to raise the collateral estoppel and res judicata issues which are discussed in the Respondents' Brief in Opposition to the Writ of Certiorari. The State court exceeded its authority in *Greger* by ignoring the supremacy clause and refusing to defer to the previous federal decisions on this issue of federal law.

relinquished its aboriginal claim to more than 11 million acres of land in exchange for the exclusive and unrestricted use of a reservation of approximately four hundred thousand acres in what was later to become Charles Mix County, South Dakota; certain direct payments; scheduled annuities; and the construction of schools and agency facilities. 11 Stat. 743 (1858). App. 99-110. The Reservation was set aside as a permanent home for the Tribe, and the United States promised:

> [t]o protect the said Yanctons [sic] in the quiet and peaceable possession of the said tract of four hundred thousand acres of land so reserved for their future home, and also their persons and property thereon during good behavior on their part.

App. at 102.[5] A description of the boundaries of the Reservation is contained in the 1858 Treaty.[6]

Article XVIII of the 1892 surplus land sale Agreement negotiated between the Yanktons and the United States, which was incorporated in the 1894 Act, reaffirms the provisions of the 1858 Treaty. *See* 1894 Act, App. 111-24.

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[5] A land survey later revealed that 430,495 acres were actually included in the area described as the Reservation. S. Exec. Doc. No. 27; JA 117.

[6] The 1858 Treaty describes the boundaries of the Reservation as follows:

> Beginning at the mouth of the Naw-izi-wa-koo-pah or Chouteau River and extending up the Missouri River thirty miles; thence due north to a point; thence easterly to a point on the said Chouteau River; thence down said river to the place of beginning, so as to include the said quantity of four hundred thousand acres.

App. 100-01.

No document subsequent to the 1858 Treaty describes new or different Reservation boundaries. *Id.*

D. Historical facts prior to the 1892 Agreement.

In the years preceding the 1892 Agreement, the Yankton people suffered persistent drought, floods, grasshopper plagues, and shortages of food in extremes never before, or since, experienced in that region. T. 41-42; JA 576-77. At the same time white settlers and businessmen exerted great pressure on the federal government to open up the Reservation land for settlement. T. 68-69, JA 573. The surge of immigrants from Europe at the end of the Nineteenth Century also created enormous pressure on the United States Government to find more land for white settlement. *Id.* With the enactment of the Allotment Act, Dawes Act, 24 Stat. 388, codified at 18 U.S.C. § 331 *et seq.*, and the subsequent allotment of Tribal lands, Tribal leaders ultimately agreed to enter into negotiations to sell "surplus" lands left over from the allotment process. By then, the Tribe's economy had been destroyed and there was increasing pressure of white expansionism. The culmination of the negotiations was the Agreement of 1892, selling the unallotted Tribal lands to the United States. *See* T. 30; S. Exec. Doc. 27, 53rd Congress, 2d Sess. (1894), Exhibit C-5, JA 108-358.

The Dawes Act radically changed the manner of Indian ownership of land. Prior to the Dawes Act, the lands of the Yankton Sioux Tribe were held communally. JA 580. Some Tribal members were provided with "assignments" of Tribal lands which they were allowed to farm, but ownership remained with the Tribe. JA 580. The Dawes Act created a new policy of forcing individual Indians to accept allotted tracts of reservation land for

the purpose "of promoting interaction between the races and of encouraging Indians to adopt white ways." *Mattz v. Arnett*, 412 U.S. 481, 496 (1973).

In accordance with the Dawes Act's policy, the government then allotted 167,325 acres of Yankton Reservation land to individual Indians. JA 98-99, 117. These allotments were scattered throughout the Reservation. JA 137. These initial allotments left 95,000 acres of land to be used for future allotments and for future use by the Tribe, including 852 acres reserved for government and religious purposes. JA 98-99. A surplus of approximately 168,000 acres of unallotted lands remained. *Id.* It is these "surplus" acres that the United States sought to acquire for settlement by non-Indian farmers, businessmen, and settlers. JA 573-77.

In 1892, the Secretary of the Interior appointed a three-member commission to negotiate with the Yankton Indians for the sale of their unallotted "surplus lands" within the reservation.[7] *Id.*; JA 98-101. The Department of Interior instructed the Commissioners to purchase whatever surplus lands the Yanktons were willing to sell. JA 98-99. If the Indians were unwilling to sell all of their surplus lands, the Commissioners were to "endeavor to obtain the relinquishment of such part thereof as they may be willing to part with." *Id.* Entering into the negotiations, the Commissioners were cognizant of the attempts of the government for over a quarter century to,

[7] The Secretary of Interior cited his authority as the Indian Appropriation Act for 1892 which enabled the Department to "negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress." JA 98.

"civilize these Indians." JA 145. The commissioners stated that:

> the purchase of surplus lands was but a small part of our mission and of minor importance to both the Indians and the Government, the provisions connected therewith for the future welfare of the Indians being of greater importance to them and to the Government than the sale of their surplus lands.

JA 146.

E. Negotiations between the Yankton Sioux Indians and the United States.

1. Manner of sale of the surplus lands.

A key issue of the negotiations between the Yanktons and the United States was the manner of sale and the price to be paid for the surplus land. The method preferred both by the Tribe, and initially by the Government, was the "appraisement and sale" method, where individual parcels would be appraised for their value, then offered for sale at the appraised price, with the Government acting as sales agent for the Tribe. JA 135-39. However, the Commissioners feared that this method would result in only the most desirable land being sold. *Id.* They feared that such selective sale of tracts would require future government commissions to come to South Dakota to sell the less desirable surplus lands remaining unsold. JA 136. The Commissioners decided to proceed with a plan of direct sale to the United States; they made an offer to the Tribe and formulated an agreement based upon that plan. *Id.*

The Commissioners recognized that "the Indians had no intention of selling their whole reservation." JA 136-37. Instead, the Commissioners were concerned with

making an agreement that would intermix the "frugal, moral and industrious" settlers among the Tribal allotments within the reservation in order to "stimulate individual effort and make their [the Indians] progress much more rapid than heretofore." Exhibit 7; Sen. Rpt. No. 196, 53rd Cong. 2d Session (1894). As Commissioners Cole and Adams pointed out, "the surplus lands are not in one body, but scattered over the reservation and mixed up with the allotted lands of the Indians." JA 137. Throughout the entire history of the negotiations, contained in Senate Ex. Doc. 27, 53rd Cong. 2nd Sess. (1894), Exhibit 605, the Commissioners contemplated the continuation of the reservation by uniformly referring to the sale of the Tribe's "surplus" lands, but not of termination or disestablishment of the reservation itself.[8] JA 108-358.

2. Trust period.

Article IV of the 1894 Act established a trust period of twenty-five years, after which the Indians were to gain fee title to their allotted lands and take on the full duties and responsibilities of citizenship. App. 112-13. Five hundred thousand dollars of the purchase price for the land was to be held in trust by the Government for the Indians during this period. App. 113.

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[8] The Commission's lengthy report begins with a description of the proposed congressional Act "relating to the disposition of the surplus lands" of the Yankton Tribe of Sioux or Dakota Indians. JA 108-109. Commissioner Cole told the Indians that the "Great White Father has sent us here to treat with you. He wants to give you a chance to sell your surplus lands because he thinks it will be good for you . . . He wants you to keep your homes forever. (How!) He only wants you to sell your surplus lands for which you have no use." JA 208.

The Government's allotment policy at the turn of the century, together with the enactment of surplus land acts, was intended to gradually phase out the reservation system, and to assimilate Indians into American society. *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). Conventional wisdom then held that Indian reservations would, within a few years, be a thing of the past. *Solem*, 465 U.S. at 468. However, the trust status of Indian reservation lands was extended repeatedly by Congress until the entire allotment policy was expressly disavowed by Congress in the Indian Reorganization Act of 1934. *Id.* at n. 9.

3. Liquor provision.

During the negotiations, the Yanktons expressed serious concerns about the active and lucrative trade in alcoholic beverages that flourished both on their Reservation and surrounding it. JA 154-55, 603-07. Tribal leaders feared that opening portions of the reservation to white settlement would allow a flood of liquor into Indian country. *Id.* The Commissioners agreed to include a forceful provision prohibiting the sale of whiskey on the Reservation. 1892 Agreement, Article XVII, JA 154, 199.

4. Savings Clause.

In negotiating the 1892 Agreement, the parties made repeated references to the provisions of the 1858 Treaty. *See, e.g.*, JA 115-16, 239, 259-62, 306-07, 315. In this regard, the 1892 Agreement included an explicit savings clause, which is unique among Indian surplus land agreements of that era, both in its language and in its obvious intended effect. App. 16, 81. Article XVIII of the Agreement provides that:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19, 1858, between the Yankton tribe of Sioux Indians and the United States. And after the signing of this agreement and its ratification by Congress, all provisions of said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19, 1858.

App. 120.

As noted above, the 1894 Act makes no reference to new or altered Reservation boundaries, nor does it describe any new boundaries of the Yankton Reservation. Neither the Act nor the Agreement contains any language that can be construed as referring to the disestablishment of the Reservation.

Commissioner Cole reassured the Indians about the effects of the Agreement:

> I desire to congratulate you upon consummating the best treaty which any tribe of Indians has ever made – a treaty which if ratified by Congress and successfully carried out, will benefit your people for all time.

JA 324-25, 348.

John P. Williamson, a Presbyterian missionary, respected and trusted by tribal members, in response to a request by the Commissioners, stated in a letter that by signing the agreement the Indians would not be relinquishing their rights under the 1858 Treaty. The Rev. Williamson wrote:

> I can say to the Indians that I believe the terms of this agreement are the most liberal that could be granted them at this time, and that if this

> agreement is consummated I have no doubt that the stipulations will be faithfully carried out. Also, I consider the provisions for the care of the poor, for schools, and for court expenses, to be very judicious as being preparatory for full citizenship. ***And further there is no cause for apprehension that this agreement will in any way interfere with the treaty of 1858.***

JA 317-18 (emphasis added).

Article XVIII also dealt with the Tribe's concerns about their annuities. App. 120. Tribal members believed they would lose their annuities if they refused to approve the land sale. JA 587-89. The annuities clause in Article XVIII calmed the Tribe's fears that their refusal to sign the new Agreement would cause the government to stop provision of their promised annuities. *Id.*

5. Legislative History.

The extensive legislative history relied upon by the State includes only a fleeting reference to the Yankton surplus land sale. Exhibit 669, JA 362-449. Discussion in the United States House of Representatives with respect to the opening of the Yankton Reservation for non-Indian settlement dealt with the issue of whether or not the sale of lands to homesteaders would contravene the intent of the Homestead Act. JA 382-83. Congressional discussion was silent on the boundaries of the Yankton Sioux Indian Reservation. *Id.* No mention was made of any intent to disestablish the Reservation or of any understanding that disestablishment would be the result of the surplus land sale. *Id.*

F. Opening of the reservation for settlement.

On May 16, 1895, President Grover Cleveland issued a Proclamation opening the unallotted surplus reservation lands for settlement under the existing federal homestead laws. 29 Stat. 865 (1895); T. 26; JA 453-57. The lands sold by the Tribe were described as follows:

> unallotted lands ***within the limits of the reservation*** set apart to said tribe by the first article of the treaty of April nineteenth, eighteen hundred and fifty-eight, between said tribe and the United States. . . .

JA 453 (emphasis added).

The Proclamation included a "Schedule of Lands ***within the Yankton Reservation***, South Dakota, to be opened to settlement by Proclamation of the President," listing the legal description of the unallotted parcels of reservation land. JA 456 (emphasis added).

G. Subsequent History of the Reservation Area.

1. References to "reservation" in official documents.

As the Court of Appeals found, the lands of the Yankton Sioux Tribe consistently have been referred to since 1894 as the "reservation" both in official and unofficial documents. App. 33. Professor Herbert Hoover, who has written extensively about the Tribe and who presented the only historical testimony at trial, testified that the area at issue is nearly always referred to as the "reservation" in the ten thousand odd documents that he had reviewed. T. 264; *See* App. 33. References to "former" or other such language in regard to the Yankton Sioux Indian Reservation are extremely infrequent. *Id.*

Other government officials, charged with responsibility to the Yankton Indians, continued to describe the reservation area as continuing to exist within the 1858 Treaty boundaries. In 1903, Inspector S. F. O'Fallon, reporting on his examination of the sales of inherited land at the Yankton Agency, stated:

> ***The Yankton reservation is in Charles Dix [sic] County*** on the Southern border of the State of South Dakota. It is situated on the East bank of the Missouri river, having a river frontage of about 33 miles, and extending back from the river something like 20 miles. Besides the Missouri river, ***the reservation has several small creeks and Lake Andes***, quite a large body of water, now supplied by two artesian wells constructed by the Government. Three years ago a line of the Chicago, Milwaukee and St. Paul Railway was built ***through the center of the reservation East to West*** . . . After alloting [sic] all the members of this tribe from their tribal lands, the remainder was bought by the Government and has been taken as homesteads by white settlers.

T. 30; JA 468 (emphasis added).

In 1914, Congress held hearings investigating conditions on the Yankton Sioux Reservation. JA 477-79. In response to a question by Representative Charles D. Carter of Oklahoma about the size of the Yankton Reservation, Superintendent Leech stated that the reservation was "About 20 by 35 or 36 miles."[9] JA 479. This was the size of the Reservation described in the 1858 Treaty.

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[9] During previous questioning, Leech had indicated that of the original 268,000 acres allotted to individual Indians, only 98,000 remained in their hands with the remainder sold under the 1894 Agreement and in subsequent individual sales. JA 477.

The Eighth Circuit further noted that Felix Cohen, perhaps the preeminent authority on federal Indian law, while serving as Acting Solicitor of the Department of Interior, had unequivocally concluded that the Yankton Sioux Indian Reservation was a "still existing unit in the acts of April 29, 1920, (41 Stat. 1468) and June 11, 1932 (47 Stat. 300)." JA 37 (*citing* Letter of August 7, 1941, *Opinions of the Solicitor, Department of the Interior* 1063 (1979)). In contrast, testimony by one of the State's witnesses, an employee with the Department of Game, Fish and Parks, disclosed at trial that his reference to the area as the "former" Yankton Sioux Reservation was inspired by a memorandum from the then Governor of South Dakota directing State employees to refer to the Yankton Sioux Reservation as the "former" Yankton Sioux Reservation. JA 709-10.

2. Maps

The Eighth Circuit found that maps of the area drawn after the 1894 Act were inconclusive as to the continuation of the Reservation. App. 33. However, Titus Marks, a realty specialist for the Bureau of Indian Affairs (BIA) area office in Aberdeen, South Dakota, testified that the BIA, which is charged with federal oversight of South Dakota Indian reservations, has continually recognized the 1858 Treaty boundaries in its maps. T. 356; JA 678.

Leech also stated that, although the allotment rolls had closed on June 18, 1892, the allotment process on the reservation was still proceeding, but was practically complete at the time of the hearing. JA 478.

3. Continuity of tribal governance.

In spite of the hardships and obstacles placed in the way of the Tribe, Tribal governance has existed continually through the time of the sale of the surplus lands in 1894 to the present. JA 541. During the third decade of the Twentieth Century, there was a radical shift from the federal policy of allotment and assimilation, to one of respect for traditional aspects of Indian culture, identification of individual rights and encouragement of tribal sovereignty and self-governance. F. Cohen, *Handbook of Federal Indian Law*, Ch. 2, Sec. D1, (1982).

At the beginning of this shift in Indian policy, the Yankton Sioux Tribe adopted its first Constitution and Bylaws in 1932, which was limited to provisions for setting up and empowering a tribal Business and Claims Committee. Exhibit 651; JA 483-88, 541. A broader Constitution was adopted in 1962, and a Law and Order Code in 1995. Exh. 652; JA 493.

4. Demographics.

Between 1970 and 1990 the Indian population of Charles Mix County, which includes the Yankton Sioux Reservation, increased by 116 percent, while the non-Indian population decreased by 21.4 percent. JA 615. According to the 1990 census, there were 1,994 American Indians and 4,275 non-Indians living on the "Yankton Reservation," which the Census Bureau defined according to its 1858 boundaries. App. 42. The Tribe has significantly bolstered the economy of the Reservation by the establishment, in 1991, of the Fort Randall Casino, which has decreased unemployment on the Reservation. The

casino has provided the basis for substantial Tribal economic development as well as for a positive economic impact on the non-Indian residents of Charles Mix County. App. 43. By 1993, there were 6,000 enrolled members of the Yankton Sioux Tribe, 3,400 of whom lived on the reservation. JA 545.

SUMMARY OF THE ARGUMENT

1. Congress expressed an intent to preserve the boundaries of the Yankton Sioux Reservation in the language of the 1894 Act opening the Reservation to white settlement. The Act contains no language of "diminishment," "disestablishment" or return of the land to the public domain. Congress did not describe new or altered boundaries of the Reservation, but rather, incorporated the boundaries of the 1858 Treaty into the Act.

2. The "cession" and "sum certain" language in Articles I and II of the 1894 Act, without a statutory expression of Congressional intent to diminish, does not raise a presumption of disestablishment. Both the Tribe and the United States Government preferred an "appraisement and sale" method of sale. The "direct" sale method, which led to the inclusion of the "cession" and "sum certain" language, was employed by the Commissioners, not for jurisdiction or sovereignty purposes, but because they feared that the appraisement and sale method would require future commissions to complete their work.

3. Article XVIII, the "savings clause," of the 1894 Act is unique, distinguishing the Yankton surplus land sales Act from other land sales acts. The savings clause twice provides that the 1858 Treaty is to be preserved. Article XVIII preserves the boundaries of the Reservation,

while at the same time opens the land within the Reservation to white settlement.

4. The other provisions of the 1894 Act are consistent with Congress' intent to preserve the boundaries of the Reservation. The provisions of the Act which reserved land for school purposes to be subject to the laws of the state indicate an intent to maintain intact the Reservation boundaries. If the Reservation had been disestablished, as the State contends, all of the unallotted land would be automatically subject to the laws of the state, making that language redundant.

In an attempt to curb the lucrative alcohol trade on the reservation and prevent harm to their members, the Yankton Indians insisted on the inclusion of a liquor provision in the 1894 Act which prohibited alcohol within the boundaries of the reservation forever. This provision is completely consistent with – and indeed supports – the continued existence of the Reservation.

5. The contemporaneous negotiation and legislative history supports the conclusion that the intent of Congress in 1894 was to maintain the boundaries of the Yankton Sioux Reservation. There is no discussion contained in the extensive negotiation history of the 1892 Agreement between the Tribe and the Government of altered boundaries or of the extinction of tribal governance over the reservation area. Instead, the negotiation history reveals a clear understanding by the Tribe and the Government that the 1858 Treaty provisions were to be preserved. The negotiation and legislative history of the 1894 Act are clearly distinguishable from those of the Sisseton-Wahpeton and Rosebud Reservations.

6. There is substantial evidence in the subsequent history of the area to support a finding that the intent of

Congress was to preserve the 1858 boundaries. The United States Government has consistently referred to the area as the "reservation" in statutes and documents following the enactment of the 1894 Act. In addition, maps of the area have continued to show the 1858 boundaries of the Reservation.

The Tribe has always maintained a continuum of tribal governance over the Reservation area. Currently, the Tribe is the largest employer within Charles Mix County. Tribal population on the Reservation is increasing, while the non-Indian population is decreasing.

7. Under the *Hagen/Solem* analysis, the evidence of this case supports the holding of the United States Court of Appeals for the Eighth Circuit that the intent of Congress was to preserve the 1858 Treaty boundaries.

8. The State of South Dakota has failed to demonstrate compelling and substantial evidence of congressional intention to disestablish the Yankton Sioux Indian Reservation. No presumption of disestablishment arises in this case under the clear language of the 1894 Act, the negotiation and legislative history, and the surrounding circumstances. The most the State can argue is that the evidence creates an ambiguity, which must be resolved in favor of the Indians.

ARGUMENT

Legal Analytical Framework

Both of the lower courts below have held that Congress did not intend to disestablish the boundaries of the Yankton Sioux Indian Reservation by the 1894 Act, 28 Stat. 314-19. In order to reach this decision, both Courts carefully followed the "analytical structure" developed

by this Court. App. 1-65; App. 66-97. *See Hagen v. Utah*, 510 U.S. 399, 410-11 (1994); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Under the *Hagen/Solem* analysis, a Court must examine three factors in the following order of probative importance in order to determine whether a reservation has been diminished or disestablished: (1) the statutory language used to open the reservation for settlement; (2) the historical context surrounding the passage of the applicable surplus land act; and lastly (3) the pattern of settlement subsequent to the Act. *Hagen*, 510 U.S. at 411.

"It is settled law" that some surplus land Acts diminished reservations, *see, e.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and other surplus land acts do not, *see, e.g., Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962); *Solem v. Bartlett*, 465 U.S. 463, 469 (1984). "The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470.

The "most probative evidence" of the intent of Congress to preserve, diminish, or terminate the boundaries of an Indian reservation is the statutory language used to open the reservation to settlement by non-Indians. *Hagen*, 510 U.S. at 411. In order to determine Congress' intent, courts may also examine the historical context, including the legislative history surrounding the passage of the Act, being "careful to distinguish between evidence of the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage." *Id.* Finally, "and to a lesser extent," courts may examine events occurring immediately following the opening of the surplus lands as well as patterns of settlement, either

of which may provide some evidence of the intent of Congress. *Solem*, 465 U.S. at 471.

Guiding the entire legal analysis are established canons of statutory construction interpreting statutes affecting the rights of Indian tribes, canons "firmly rooted in the unique trust relationship between the United States and the Indians." *County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985). As the Eighth Circuit observed, because the government is subject to a fiduciary standard in negotiating with Indian tribes, a strong presumption prevails that "reservation lands and boundaries are to remain intact." *United States v. Grey Bear*, 828 F.2d 1286, 1289 (8th Cir. 1987).

Thus, once Congress creates an Indian reservation for the benefit of a tribe, diminishment or disestablishment of its boundaries will never be lightly inferred. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 472. "Great nations, like great men, should keep their word . . . " *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J. dissenting). A heavy burden rests upon the party urging disestablishment to demonstrate "compelling and substantial evidence of a congressional intention to diminish Indian lands . . . " *Solem*, 465 U.S. at 472.

As a corollary to this settled approach, evidence supporting a claim of disestablishment must show congressional intent to terminate a reservation with sufficient clarity to overcome the "general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975); *see also, United States v. Dion*, 476 U.S. 734, 738 (1986). Thus, this Court has repeatedly recognized that statutes alleged

to alter or to eliminate reservation boundaries "are to be construed liberally in favor of the Indians . . . " *Hagen*, 510 U.S. at 411 (quoting *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 269 (1993)).

Ambiguities that may arise in the interpretation of such statutes "are to be resolved in favor of the Indians . . . " *Hagen*, 510 U.S. at 411. Moreover, the terms of an agreement with an Indian tribe must be construed "in the sense in which they would naturally be understood by the Indians." *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979).

Respondents believe that an application of these canons of construction leads convincingly to the conclusion that the 1894 Act, while opening the surplus or unallotted Reservation lands to settlement by non-Indians, did not terminate the Yankton Sioux Reservation. If the Court does not find that the 1894 Act clearly preserves the 1858 Treaty boundaries of the Reservation, we submit that it must agree that the situation created by the 1894 Act was, at worst (from the Tribe's perspective) an ambiguous one. The State has the burden of establishing that the 1894 Act ***unambiguously*** terminated the Reservation. *Solem*, 465 U.S. at 472. This, the State cannot do. Unless the Court is to abandon its correct and firmly established view that ambiguities in Congressional enactments respecting Indian tribes – including surplus land acts – must be resolved in favor of the Indians, it should hold that the Yankton Sioux Reservation has not been terminated. *See Hagen*, 510 U.S. at 411.

I. THE LANGUAGE OF CONGRESS IN THE 1894 ACT OPENING THE YANKTON SIOUX INDIAN RESERVATION TO WHITE SETTLEMENT SHOWS CONGRESSIONAL INTENT TO PRESERVE THE BOUNDARIES OF THE RESERVATION AS ESTABLISHED BY THE TREATY OF 1858.

A. The 1894 Act opening the Yankton Reservation to white settlement contains no language of diminishment or disestablishment, nor does it return Reservation land to the public domain.

In its brief, the State of South Dakota asserts that it has used the terms "disestablished" and "diminished" interchangeably to mean that the former reservation boundaries and status are "terminated" and that "Indian Country" status attaches only to remaining or non-extinguished allotments and dependent Indian communities. Brief of the State of South Dakota at p. 2, n. 2. The State is thus asking this Court to abolish the entire Reservation, leaving only the Indian owned allotments as Indian Country checkerboarded throughout.[10]

Under the meaning of "diminish," the Yankton Sioux Reservation would have been reduced in size by virtue of the 1894 statute. But if Congress had intended to diminish, there would have been new boundaries drawn in the 1894 statute.

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[10] As the Court of Appeals for the Eighth Circuit noted, the terms "diminished" and "disestablished" are not synonymous. Disestablishment of the Yankton reservation boundaries, which is urged by the State in this appeal, describes the "relatively rare elimination of a reservation as opposed to the reduction in size of a reservation, or 'diminishment.'" App. 6 n.4. (citation omitted).

No such new boundaries exist.

The 1858 Treaty diminished the 11 million acre Yankton Sioux Reservation, as evidenced by the inclusion of a legal description of the new, altered Reservation contained in the Treaty. Even if the Tribe did not know how to draw new boundaries in 1892, certainly the government did, if indeed Congress intended to diminish the Reservation then. But no new description was ever contemplated, discussed, or drafted in the 1894 Act. It seems clear that the 1894 Act did not diminish the Reservation; the remaining question is whether that Act terminated, or "disestablished" the Reservation.

The most direct evidence of Congressional intent to "disestablish" any Indian reservation would be express statutory language using that term. The Court has recognized that "Congress was fully aware of the means by which termination [of a reservation] could be effected" when drafting surplus land legislation. *Mattz v. Arnett*, 412 U.S. 481, 504 (1973). There is, however, no direct or indirect language of disestablishment in the text of the 1894 Act, in the Presidential Proclamation executing the provisions of the Act, or in any other document concerning the negotiating and legislative history surrounding the Act. The Fifty-Third Congress could have stated its intention to eliminate the Yankton Sioux Indian Reservation by inserting such language if that was its intent.[11] In

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[11] The Fifty-Third Congress knew how to unambiguously diminish and alter the boundaries of an Indian reservation. In the very same act that ratified the 1892 agreement between the Yankton Sioux and the government, Congress ratified an agreement between the Coeur d'Alene Indians and the government which provided "for a change of the northern line of their [Coeur d'Alene] reservation so as to exclude therefrom a

fact, the 1892 Agreement that is incorporated into the 1894 Act states precisely the opposite intention by providing that, "nothing in this agreement shall be construed to abrogate the Treaty of April 19, 1858," (the Treaty that established the Reservation) and that, "all provisions of said treaty . . . shall be in full force and effect, the same as though this agreement had not been made. . . . " App. 120.

As well, there is no reference in the Act, or in any of the related documents, to the Tribe's surplus land being "returned" to the "public domain," language that was central to this Court's decision in *Hagen v. Utah*, 510 U.S. 399 (1994). In fact, the Tribe holds aboriginal title – never extinguished – to the 1858 Reservation, and the Reservation has never been a part of the public domain. JA 470-72.

Finally, the 1894 Act states Congress' intention that a "part" or "portion" of the Yankton Reservation will be open to non-Indian settlement, plainly indicating that the Reservation would maintain its reservation status.[12]

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strip of land on which the town of Harrison and numerous settlers are located." 28 Stat. 286, 322. Congress specifically stated that "for the purpose of segregating the ceded land from the diminished Coeur d'Alene Indian Reservation, [the new boundary lines of the reservation] shall be properly surveyed and permanently marked in a plain and substantial manner. . . . " *Id.*

[12] For example, the preface to the 1894 Act refers to the disposal of a "*portion of the land set apart and reserved to* said tribe. . . . " App. 112. Article I of the Agreement restricts the conveyance of title to the "unallotted lands *within the limits of the reservation* set apart to said Indians as aforesaid." App. 112-13. Article XIII recognizes the tribal rights of mixed-blood members as equal to other persons "who have been allotted lands *on the reservation described in this agreement* . . . " App. 118. Article XVII

Congress thus showed that the Yankton Sioux Act of 1894 was one of those surplus land acts that did not diminish or disestablish an existing reservation, but that merely opened the surplus land in an existing and continuing Reservation to settlement by non-Indians within the Reservation. *See Solem*, 465 U.S. at 469.

B. Article XVIII of the 1892 Agreement unequivocally expresses the intent of Congress to preserve the Yankton Sioux Indian Reservation boundaries following the sale of the unallotted Yankton Reservation lands.

Article XVIII, the "savings clause," distinguishes the Yankton surplus land Act from other such Acts, and the Yankton Reservation from other reservations which this

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provides that no intoxicating liquors "shall ever be sold or given away upon any of the lands by this agreement ceded and sold to the United States, nor upon any *other lands within or comprising the reservations of the Yankton Sioux or Dakota Indians* . . . " as described in the 1858 Treaty. (The plural reference to "reservations" includes the Tribe's claim to the Pipestone Reservation and quarry which is covered in Article XVI of the Agreement.) App. 120. The provisos attached to the Act refer to the agency buildings "*upon said reservation*" and set punishments for the selling of intoxicating liquors *upon any of the lands included in the "Yankton Sioux Indian Reservation as created by the treaty of April nineteenth, eighteen hundred and fifty-eight.* . . . " App. 123-24. (emphasis added).

In addition, President Cleveland's Proclamation opening the reservation for settlement included a "Schedule of Lands *within the Yankton Reservation, South Dakota*, to be opened to settlement by Proclamation of the President." 29 Stat. 865; JA 456. The only interpretation of this language is one consistent with the continued existence of the Reservation following the sale of the unallotted land.

Court has found to have been diminished or disestablished. Article XVIII twice indicates that the 1858 Treaty between the Tribe and the United States establishing the Reservation is to remain undisturbed. In its first sentence, the Article states:

> Nothing in this agreement shall be construed to abrogate the treaty of April 19th, 1858, between the Yankton Tribe of Sioux Indians and the United States.

App. 120.

The second sentence of the Article then states:

> And after the signing of this agreement, and its ratification by Congress, all provisions of the said treaty of April 19th, 1858, shall be in full force and effect, the same as though this agreement had not been made, and the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th, 1858.

Id.

The State argues that this provision goes well beyond a concern for the Tribe's annuities. However, Professor Hoover pointed out in unrefuted testimony that the Tribe was undoubtedly concerned about a cut-off of annuities based upon the government's earlier action in shutting off the annuities of another Sioux Tribe when, in the government's eyes, that tribe misbehaved. JA 588. If concern for annuities was the sole purpose of Article XVIII, that easily could have been taken care of by saying simply, "the said Yankton Indians shall continue to receive their annuities under the said treaty of April 19th,

1858."[13] The remainder of Article XVIII would have been entirely unnecessary. The only reasonable interpretation of Article XVIII, as it is actually written, is that it preserved intact the terms of the 1858 Treaty, including the Reservation's boundaries, and that the whites who purchased surplus lands could enter and live on those lands.

To presume, as the State urges, that reading Article XVIII to preserve the Reservation would prevent non-Indians from purchasing land and entering upon the Reservation, would be to reduce the Article to an absurdity. While the Tribe was at a linguistic disadvantage during the drafting of the 1892 Agreement, the government's agents and the members of Congress who approved the Agreement were not. The Agreement as a whole clearly provides both that the Reservation should be preserved and that surplus lands within it should be sold for settlement by whites. The savings clause can and should be read as being consistent with these dual purposes.

Article XVIII expressly and unambiguously states that the intention of the United States Congress was to recognize the 1858 Treaty as the primary instrument governing the Yankton Reservation, and that the 1892 Agreement served only to modify certain of its provisions. At the time it ratified the 1892 Agreement, Congress was aware that the 1858 Treaty provided a four hundred thousand acre reservation for the Indians' "quiet and peaceable possession . . . during good behavior on their

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[13] The Court of Appeals found that, "Congress knew how to limit the reach of an annuities provision. . . . " App. 19 (citing *Shoshone Tribe v. United States*, 299 U.S. 476, 489 (1937) and language from a treaty with the Shoshone Indians of Wyoming).

part." App. 102; JA 99. There seems to be no question that the intent of Congress in including Article XVIII was to maintain the boundaries of the Reservation as described in the 1858 Treaty, while at the same time opening land within the Reservation for white settlement. As this Court has stated, allotment and sale of Indian land is "completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497.

Article XVIII is the final substantive provision of the 1892 Agreement. Articles XIX and XX deal only with copying and signing the Agreement. As a summary of the effect of the preceding substantive provisions, Article XVIII contains an especially clear expression of firm congressional intent that the Yankton Sioux Reservation continues to exist following its opening for white settlement.[14]

Contrary to the State's assertions, the Crow Reservation is not analogous to the Reservation in this case. See *United States v. State of Montana*, 457 F.Supp. 599, 601 (D. Mont. 1978), *rev'd*, 604 F.2d 1162 (9th Cir. 1979), *aff'd*, *Montana v. U.S.*, 450 U.S. 544 (1980). Congress divested the Crow Tribe of discrete portions of the Crow Reservation through a series of legislative enactments. *Id.* Each of those agreements specifically described the boundaries of the ceded portions of the reservation land without *restating* the original boundaries. *Id.* See also Preamble, Act of April 11, 1882, 22 Stat. 42; Section 31, Act of March 3,

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[14] Based upon his exhaustive historical research into the Yankton Sioux Tribe and its Reservation, Dr. Hoover concluded that the intent of Congress and the Yankton Indians was to maintain the boundaries as established by the Treaty of 1858. JA 597-600.

1891, 26 Stat. 1039; Article I, Act of April 27, 1904, 33 Stat. 352.

In the case of the Yankton Sioux Reservation, however, the 1894 Act did not describe the parcels of land involved in the sale. The only reference to the Yankton boundaries occurred in the 1858 Treaty, and it is these boundaries, expressly incorporated by reference in Article XVIII, that describe the resulting, unchanged Reservation area. This is the conclusion reached both by the trial court and by the Eighth Circuit, and is the only conclusion consistent with all of the historical facts.[15]

Article XVIII is a true "savings" clause, incorporating by reference the provisions of an earlier act, the 1858 Treaty, in order to give the prior provisions effect. Generally, when a statute adopts a part or all of another statute by specific reference, the original statute is given effect by its express provisions, notwithstanding intervening amendments or modifications. *Hassett v. Welch*, 303 U.S. 303, 314 (1937); *Rainwater v. United States*, 356 U.S. 590,

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[15] We also note the lack of a similar savings clause in the Act of March 19, 1889, 26 Stat. 1035, opening the lands of the Sisseton and Wahpeton Indians for settlement, which the State has tried to allege is the functional equivalent of the Yankton Act. *DeCoteau v. District County Court*, 420 U.S. 425, 455-60 (1975).

Similarly, the savings clauses in the serial Rosebud Acts, which provided that "nothing in this agreement shall be construed to deprive the . . . Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under the existing treaties or agreements, not inconsistent with the provisions of this agreement[.]" are clearly limited in effect and are not the equivalent of the broad reach of Article XVIII of the Yankton Act. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 623, n.11 (1977) (Marshall, J. dissenting.)

593 (1958). All of the provisions of the prior enactment are read as though written into the subsequent statute. *Hassett*, 303 U.S. at 314. *See also* App. 17; *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

C. Article VIII and the other school lands provisions of the 1894 Act support the intent of the Fifty-Third Congress to retain the boundaries of the Yankton Sioux Indian Reservation.

Article VIII of the 1894 Act provides that "[s]uch part of the surplus lands hereby ceded and sold to the United States, as may now be occupied by the United States for agency, schools, and other purposes shall be reserved from sale to settlers until they are no longer required for such purposes." App. 116.

A similar provision in the Act opening the Cheyenne River Reservation for settlement was addressed by the Court in *Solem v. Bartlett*, 465 U.S. at 474. The Court found that the provision "strongly suggest[s] that the unallotted opened lands would for the immediate future remain an integral part" of the reservation. *Id.* The Court added that "[i]t is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation." *Id.* This "set aside" provision is totally absent from the Sisseton-Wahpeton Agreement upon which the State heavily relies. *See DeCoteau*, 420 U.S. at 455-60.

An even more direct reflection of the intent of Congress is found among the provisos appended to the 1892 Articles of Agreement. Congress there spoke about the status that the Yankton Sioux lands would have following the opening of their reservation for white settlement:

> The lands by said agreement ceded, to the United States shall, upon proclamation by the President, be opened to settlement, and shall be subject to disposal only under the homestead and town-site laws of the United States, excepting the sixteenth and thirty-sixth sections in each Congressional township, which shall be reserved for common-school purposes and ***be subject to the laws of the State of South Dakota***.

App. 123 (emphasis added).

If the intent of Congress had been to disestablish the Yankton Reservation, ***all*** of the prior reservation land would be automatically subject to the laws of South Dakota, making the italicized language completely unnecessary and irrelevant. The inclusion of this provision for State jurisdiction over two sections of each township clearly indicates a Congressional understanding that Reservation status was to continue for the area within the 1858 Treaty boundaries. A limited provision for State jurisdiction would not have been included in the Act if the intent of Congress was to disestablish the Reservation and return the entire area to State jurisdictional control.

Dr. Herbert Hoover, the Tribe's historical expert, testified at trial that the "set aside" lands, or administrative districts, were dispersed throughout the Reservation area to be used for Tribal purposes long after the opening of the Reservation for settlement. JA 609-11. The placement of agencies and school lands throughout the Reservation area would have created a massive "checkerboard" of jurisdiction if Congress intended to otherwise disestablish the Reservation boundaries. This Court has recognized that any interpretation which would result in a

confusing pattern of "checkerboard" jurisdiction is disfavored. *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962). Further, the United States Court of Appeals for the Eighth Circuit has observed that a court "cannot assume that Congress would intend to change [a] reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction." *United States v. Long Elk*, 565 F.2d 1032, 1039 (8th Cir. 1977).

D. The language of purchase contained in Article I and Article II of the 1894 Act, when taken in context with the other provisions of the Act and surrounding circumstances, fails to create a presumption of disestablishment.

This Court has stated that no "particular form of words" are required, nor is there magic language which is dispositive of a finding on the issue of disestablishment. *Hagen*, 510 U.S. at 411. In order for a presumption against the continuation of tribal governance to arise, the language conveying reservation land at a set price must be coupled with a further "statutory expression of congressional intent to diminish." *Id.* No such statutory expression exists in the 1894 Act. Indeed, the other provisions of that Act clearly preclude any presumption that might otherwise arise from the "cession" and "sum certain" language contained in the Act's first two articles, as each of the courts below held. App. 21, 84.

Further, the sum certain provision for the sale of the Yankton land was neither the intended nor the preferred form of disposal by the Yanktons of their surplus lands. JA 136. The government's original instructions to the Commission designated "appraisement and sale to the

highest bidder" as the intended sale option. JA 100. The Indians strongly favored this method of sale, which would have involved the appraisal of each parcel and its subsequent offer for sale. JA 135-36. The Commissioners, fearing that the less desirable lands would remain unsold, thus requiring future commissions to finish their work, opted instead for the direct sale method. *Id.* Rather than being a clear expression of Congressional intent to divest the Yanktons of their entire Reservation, the sum certain provision of the Agreement and 1894 Act were nothing more than an accommodation to the Commissioners' desire to complete their work at one time. As the Eighth Circuit correctly determined, the sum certain price in the 1894 Act was included "for reasons other than issues of jurisdiction and sovereignty." App. 15-16.

E. Article XVII, the liquor provision of the 1894 Act, is consistent with the preservation of the boundaries of the Reservation.

The State asserts that the alcohol prohibition contained in Article XVII of the 1894 Act is inconsistent with an intention of Congress to preserve the Reservation. However, as the Eighth Circuit explained, the Yankton Indians had a particular concern with the introduction of intoxicating spirits onto and through their reservation. App. 23-24. The Indians' concern, resulting in the inclusion of Article XVII, was derived from the great harm that the lucrative alcohol traffic was inflicting on tribal members. JA 154-55, 605-07. This concern was shared by the federal government. JA 555-56.

The inclusion of a provision in the Agreement that liquor be banned from the Reservation is completely consistent with continued Reservation status, given Congress' plenary power over Reservation affairs. Placing responsibility on the federal government for liquor control is, moreover, ***inconsistent*** with transfer of plenary jurisdiction over the area to the State of South Dakota, as the State contends.[16]

Further evidence of Congress's intent to maintain the Reservation appears in the legislative history of the 1894 Act as part of the Commissioners' report to the Congress that:

> The Indians very generally expressed their fear that upon the opening of the Yankton Reservation to settlement by white people, drinking saloons would be established in their midst, to the great injury of their people, and it was made an imperative condition of the sale, by the Indians, that whisky should be excluded. It is certainly to the credit of these people that they demand that this condition should be put into the agreement, and we hope that Congress will fix a penalty for the violation of this provision which will make it most effective in preventing the introduction of intoxicants ***within the limits of the reservation***.

JA 154-55. (Emphasis added).

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[16] The Eighth Circuit distinguished the liquor provision in *Rosebud* from the Yankton case, explaining that the Rosebud Act only provided for a twenty-five year prohibition of alcohol, while the Yankton Indians were insistent that liquor be prohibited forever, irrespective of future acts of Congress affecting their Reservation. App. 23-24. The Eighth Circuit held that Article XVII was "not surplusage in the same manner as the liquor provision in *Rosebud*, and is not inconsistent with the intent to preserve the 1858 boundaries." JA 24.

Because this discussion concerned the effect of the Act ***after passage***, the Congress and the Commissioners without question contemplated a continuation of the Reservation's boundaries.

II. THE LEGISLATIVE HISTORY AND THE HISTORICAL CONTEXT SURROUNDING THE PASSAGE OF THE 1894 ACT REFLECT THE INTENT OF CONGRESS TO MAINTAIN THE YANKTON SIOUX INDIAN RESERVATION AS ESTABLISHED BY THE TREATY OF 1858.

An examination of the legislative history and surrounding circumstances relating to the 1894 Act confirms the conclusion that Congress had no intent to alter the boundaries of the Yankton Sioux Indian Reservation when it passed the 1894 Act. The historical context surrounding the negotiations leading up to the 1894 Act reveal circumstances which distinguish the Yankton Sioux Reservation from both the Lake Traverse and Rosebud Reservations, which were the subject of this Court's decisions in *DeCoteau* and *Rosebud*, and upon which the State relies heavily.

A. The legislative history of the Yankton Sioux Reservation is clearly distinguishable from the history of the Sisseton-Wahpeton Indian Reservation.

Unlike the Yankton Agreement, the Sisseton-Wahpeton Agreement was negotiated contemporaneously with the allotment of the reservation lands. *DeCoteau*, 420 U.S. at 434-35. Pursuant to the 1889 agreement with the government, the Sisseton-Wahpeton Indians agreed to sell all of their unallotted lands on the condition that

"each tribal member, regardless of age or sex, receive an allotment of 160 acres . . . " *Id.*

The Sisseton and Wahpeton bands had payments of their annuities discontinued after the Sioux outbreak in Minnesota in 1862. *See DeCoteau*, 420 U.S. at 434-35; S. Exec. Doc. No. 66, 51st Cong. 1st Sess. (1890) at 2. Payment of these back annuities and the allotments for all tribal members were foremost in the minds of the Indians, with the only controversy being over whether to terminate the reservation before, or at the same time, as the annuities were paid. S. Exec. Doc. No. 66 at 7; H.R. Rpt. No. 1356, 51st Cong. 1st Sess. (1890) at 1.

The Indians felt that the additional allotments and money would fully compensate them for their land and that it "would not be proper for them also to reserve a large quantity of land" for future educational and other tribal purposes. *Id.*

In contrast, Article VIII of the 1894 Act specifically provided for the set aside of land for schools, courts and other tribal purposes. In addition, at the time of the Yankton negotiations, about 95,000 acres of the Yankton Sioux Reservation remained unallotted and were therefore still tribal lands. JA 117. The Yankton Sioux Indians viewed all land held by any or all of them to be communal tribal property, thus completely belying the State's contention that the Yankton Sioux must have understood that the sale of their surplus lands would mean the end of their tribal lands. JA 144.

The *DeCoteau* Court relied on certain unambiguous statements of Sisseton-Wahpeton tribal spokesmen regarding the intent of the Indians as to their Reservation

lands, such as, "[w]e never thought to keep this reservation in our lifetime . . . We don't expect to keep reservation." *DeCoteau*, 420 U.S. at 433. The Court considered this evidence to be indicative of the Sisseton-Wahpeton tribe's intent to accede to the disestablishment of their reservation boundaries. The principal chief of the Lake Traverse Indians, Gabriel Renville, clearly confirmed this intention when he said:

> Let them first settle our claim [loyal scout claim] and then we will talk about our surplus lands. We are now citizens and can talk with you as such, and do not care to talk about shoe pacs, etc., but cash. We can buy for ourselves what we need if payment is made in cash, ***and then we do not care to have an agency here after the surplus lands have been sold.***

Id. at 435, n. 16 (*quoting*, S. Exec. Doc. No. 66 at 19-20 (emphasis added)).

The *DeCoteau* Court held that:

> the historical circumstances make clear, this [cession of all unallotted land] was not because the tribe wished to retain its former reservation undiminished, but rather because the tribe and the Government were satisfied that retention of the allotments would provide an adequate fulcrum for tribal affairs.

Id. at 446.

In contrast to the Sisseton-Wahpeton agreement, there is nothing in the legislative history of the negotiations between the Government and the Yankton Sioux Tribe to suggest that the Reservation would not be maintained, or that future services would not be provided through the Yankton agency. The contemporaneous history reveals that the Yankton Sioux did not exchange or barter their reservation for their allotments as part of the

1894 Act. These allotments had been set prior to any negotiations for the sale of the surplus lands. As well, the contemporaneous history of the Yankton Sioux transaction does not reveal any expressions by Tribal spokesmen that either they, or any other Tribal member, saw the sale of the surplus lands as terminating the Reservation.

Unlike the agreement in *DeCoteau*, the 1894 Yankton Act expressly called for certain lands to be set aside for agency, school and other future purposes. These provisions are inexplicable unless Congress intended to maintain the boundaries of the Reservation. Neither is there any indication that the Tribe nor the United States Government saw the retention of allotments by the Yankton Sioux as providing an "adequate fulcrum for tribal affairs."

B. The legislative history of the Yankton Sioux Reservation is clearly distinguishable from the history of Rosebud Sioux Indian Reservation.

Clear distinctions also exist in the circumstances surrounding the surplus land acts which opened to white settlement several counties originally included in the Rosebud Indian Reservation. In *Rosebud v. Kneip*, this Court found in the legislative history repeated references to the fact that the size and shape of the Rosebud Reservation would be changed. *Rosebud*, 430 U.S. at 591. Among these are the following:

> [t]he cession of Gregory County . . . will leave your reservation a compact, and almost square tract, and would leave your reservation about the size and area of Pine Ridge Reservation.

Id. at 593.

> I am here to enter into an agreement which is similar to that of two years ago, except for the manner of payment . . . You will still have as large a reservation as Pine Ridge after this is cut off.

Id. at 595.

> There is no question but what the Indians have no use for the land that is proposed to be ceded by this bill; that the tract is only a very small portion of the Rosebud Reservation, and is really only a corner of the reservation, which will be left compact and in a square tract and a reservation about equal in size to the Pine Ridge Reservation, in South Dakota . . .

Id. at 595.

The *Rosebud* Court concluded that such language evinced a clear intent to change the boundaries of the reservation. No such language regarding the Yankton Sioux Indian Reservation exists, either in the legislation itself or in the legislative history surrounding the sale of the surplus lands.

C. The United States Government's instructions to the Commissioners are inconsistent with an intent to disestablish the Reservation.

The Commissioners were instructed to attempt to purchase only that part of the surplus lands within the Yankton Indian Reservation that the Indians were willing to sell. JA 98-100. The instructions from the Department of Interior stated:

> If they [the Yankton Sioux] are unwilling to cede all the surplus land you will endeavor to obtain

> the relinquishment of such part thereof as they may be willing to part with.

Id. at 99.

The Indians, therefore, had complete control of the amount of unallotted land within their Reservation that they wished to sell. This Tribal control over the amount of Reservation land to be opened to settlement is obviously inconsistent with an understanding that the Reservation was to be terminated. Applying the supposed "almost insurmountable presumption" of disestablishment, however, the State apparently argues that, had the Yankton Indians agreed to "cede, sell, relinquish and convey" only one acre of their land for a set price, the result would have been to disestablish the entire 430,495 acre Reservation.

Addressing the language in the Instructions to the Commissioners, the Eighth Circuit stated that:

> [t]hese instructions are consistent with the mission to secure land for settlement and to expose Tribal members to white settlers. Had the intent been the elimination of the reservation, ***it would have been necessary that all surplus lands be purchased*** [as the only option for the commissioners].

App. 29 (emphasis added). The fact that the Commissioners were not required to acquire all the surplus land flies in the face of the State's contentions that Congress intended to do away with the entire reservation.[17]

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[17] The State also argues that the legislative history of the 1894 Act supports an inference of diminishment, focusing on an out-of-context dialogue contained in the transcript of a House hearing on the 1894 Act in which the words, "public domain" were used. JA 382-83. The words, however, were used in a discussion of the meaning and applicability of the Homestead Act, not with regard to the continuation of Reservation status. *Id.*

III. THE PATTERN OF SETTLEMENT AND JURISDICTION SUBSEQUENT TO THE 1894 ACT DOES NOT OVERCOME THE CLEAR INTENT OF CONGRESS TO PRESERVE 1858 TREATY BOUNDARIES OF THE YANKTON SIOUX INDIAN RESERVATION.

A. The *de facto* evidence is unreliable.

At the trial in this case, the State relied almost entirely upon testimony relating to demographic and jurisdictional history of the area subsequent to the 1894 Act, urging the trial court and the Court of Appeals to rule that the Yankton Sioux Reservation had been subject to so-called *de facto* disestablishment. The State, lacking support for its position in the proper historical record, leans heavily on *de facto* disestablishment in its brief in this Court. The Court, however, has never based a disestablishment decision on such evidence. *See Solem v. Bartlett*, 465 U.S. 463, 481 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 615 (1977); *DeCoteau v. District Court*, 420 U.S. 425, 445 (1975).

In *Solem*, the Court stated that the subsequent history of a reservation area can merely provide "one additional clue" as to what Congress intended in opening land on a particular reservation to non-Indian settlers. *Solem*, 465 U.S. at 472. The controlling factor remains the clearly stated intention of Congress at the time of the enactment of the particular surplus land Act as found on the face of the Act, and in light of the contemporaneous historical

context. Subsequent *"de facto"* evidence cannot disestablish a reservation that Congress did not intend to disestablish at the time the surplus land legislation was enacted.

Indicia of subsequent demographics and jurisdictional assertions, are, therefore, "at best, confusing and unenlightening." *Rosebud*, 430 U.S. at 604 n. 27. This is true especially when there is substantial evidence on the face of the Act and in the contemporaneous record that Congress did not intend to disestablish the Reservation. *Solem*, 465 U.S. at 472.

The State's reliance on *de facto* evidence must also be closely scrutinized in light of the fact that the conventional wisdom at the turn of the century was that the allotment policy would lead to the eventual demise of the reservation system a generation after the opening of reservations. *Solem*, 465 U.S. at 468. This "turn-of-the-century assumption" was followed by a drastic sea-change in federal policy in the 1930's – a change that repudiated the allotment policy and encouraged tribal reorganization and reestablishment of the tribal land base and tribal sovereignty. *Id.*

B. The rare use of the term "former" in a few documents does not indicate the intent of the Congress to disestablish the boundaries of the Yankton Sioux Indian Reservation.

In its *de facto* argument, the State relies on several unrelated, and informal statements in the century-long historical record which refer to the "former" Yankton

Reservation.[18] However, as the Eighth Circuit noted, Dr. Herbert Hoover testified at trial that he had examined nearly ten thousand documents related to the Yankton surplus land act and subsequent events and found only a few, infrequent references to the "former" reservation, such as those few relied on by the State.[19] App. 33.

C. Maps showing the Yankton Sioux Indian Reservation are inconsistent in their treatment of the area.

As in prior diminishment/disestablishment cases which have been decided by this Court, each side in this case presented maps at trial as evidence supporting its claims. The Eighth Circuit found, however, that the maps ultimately prove little except that there was some confusion both inside and outside the government about the

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[18] The State argues that this case should be controlled by *Perrin v. United States*, 232 U.S. 478 (1914). This argument has been rejected by each of the courts below and even by the South Dakota Supreme Court, which in its latest decision regarding the Yankton Sioux Indian Reservation acknowledged that *"Perrin* **cannot** be considered *res judicata* as it did not specifically deal with diminishment . . . " App. 157, n. 13. The trial court and the Eighth Circuit similarly determined that *Perrin* dealt solely with the issue of whether or not Congress had the authority to criminalize liquor sales on land sold to non-Indians pursuant to surplus land acts. App. 25 n. 18.

[19] The attempt by the State to create "new facts" is evidenced by the trial testimony of one of the State's witnesses, Ron Catlin, an employee of the South Dakota Department of Game, Fish and Parks, who conceded during cross-examination that Governor William Janklow, during his prior term as Governor, issued a memorandum to State employees directing them to use the term "former Yankton Sioux Reservation." JA 709-10.

status of the Reservation. App. 33. In fact, if one were to accept the State's arguments, portions of the Cheyenne River Reservation, ruled to be undiminished by this Court in *Solem*, would have been found to be *de facto* terminated by a General Land Office map in 1910. JA 722.

As late as 1914, during questioning by a Congressional panel, A. W. Leech, Superintendent of the Yankton Agency, was asked how large the reservation was. In response, he stated "[a]bout 26 by 35 or 36 miles," which is the size of the area encompassed by the 1858 boundaries.[20] JA 478-79. These same boundaries and dimensions are still recognized by the Bureau of Indian Affairs today, according to Real Estate specialist Titus Marks of the Bureau's Area Office in Aberdeen, South Dakota. JA 678.

D. Assertions of jurisdiction by the State of South Dakota do not constitute evidence of disestablishment.

After the opening of the unallotted lands of the Yankton Sioux Reservation to white settlement, the State of South Dakota immediately began a policy of asserting state jurisdiction on tribal lands, attempting to displace Tribal authority. *See, e.g.*, Exh. 17, (letter of Indian agent resisting claim of State of South Dakota for land as "indemnity for school lands"), T 30. *See also* Exh. 78, T 95, JA 534. The Yankton Indians resisted these initial incursions into their sovereignty, but the State has never let up

[20] In its brief, the State argues that the reservation has been diminished to "one mile square." However, as Professor Hoover explained in his testimony at trial, the "mile square" referred to by the State is the ***agency area*** clearly referred to in the negotiation history. JA 120, JA 611.

in its efforts to assert its authority over Tribal lands, as is evident from the current appeal.

At trial, the State relied almost entirely on *de facto* evidence of State assertions of authority over the Reservation area. The State is essentially claiming adverse possession, not of land ownership, but of jurisdiction – an unusual and incorrect theory of reservation termination.

Both in its Enabling Act and in its Constitution, the State of South Dakota has foresworn jurisdiction over Indian lands. 25 Stat. 676 (Feb. 22, 1889), Resp. App. 1; Const. of South Dakota, art. XXVI, § 18, Resp. App. 2.[21] The State has since had three separate opportunities to assume jurisdiction legally over Indian Country in South Dakota but failed to do so. *Annis v. Dewey County Bank*, 335 F.Supp. 133 (D.S.D. 1971); *See also, State v. Spotted Horse*, 462 N.W.2d 463, 466-68 (S.D. 1990), *citing Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990).

[21] South Dakota Constitution, article XXVI, § 18 provides:

> That we, the people inhabiting the state of South Dakota, do agree and declare, that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries of South Dakota; and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States;. . . .

E. The current demographic trends support affirmance of the Court of Appeal's ruling.

The State argues that the "justifiable expectations" of the non-Indian population of Charles Mix County would be destroyed if the boundaries are maintained intact by this Court. However, the sky has not fallen in on the multitude of Indian reservations throughout the United States where reservation boundaries have been maintained.

This Court in *DeCoteau* dismissed an identical argument that "an end to state jurisdiction would be calamitous for all the residents of the area, Indian and non-Indian alike." *DeCoteau*, 420 U.S. at 449. This Court stated that "[t]hese competing pleas are not for us to adjudge, for our task is a narrow one," i.e., to interpret the intent of Congress in passing the Act opening the reservation for settlement. *Id.*

The demographics of the Yankton Sioux Reservation are moving in a direction consistent with Tribal sovereignty. The Yankton Sioux Tribe is now the leading employer, not only within the boundaries of its Reservation, but within all of Charles Mix County. Its casino employs hundreds of workers, and allows the Tribe to invest in other economic development projects. App. 43; JA 696-97. Tribal population has been increasing, while the non-Indian population within the Reservation has steadily decreased as the rural economy of the county flounders. JA 615.

As the Eighth Circuit found below, even if *de facto* diminishment were possible, in spite of the lack of Congressional intent in the 1894 Act and its legislative history, the record would not support it here. App. 43.

IV. THE RESULT IN THIS CASE IS, IN ALL EVENTS, DICTATED BY THE RULE THAT AMBIGUITIES IN STATUTES OR AGREEMENTS INVOLVING INDIANS MUST BE RESOLVED IN FAVOR OF THE INDIANS.

The preceding analysis of the text, history and context of the 1894 Act conclusively shows, we believe, that the Act did not terminate the Yankton Sioux Reservation. Even if this were not clear, however, the Tribe would be entitled to prevail in this case through application of the rule that ambiguities in surplus land acts be resolved in favor of the Indians. *Hagen*, 510 U.S. 411. That canon of interpretation has a strong and reasoned basis in public policy, as well as in the trust relationship that exists between the U.S. and the tribes. *Id.*

The traditional solicitude toward Indian tribes by this Court is based in part upon the bargaining realities of the relationship between the tribes and the government. *DeCoteau*, 420 U.S. at 444. The Court has recognized that, when the United States government negotiated with Indian tribes, the government was by far the stronger of the two parties. *Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 676. The Indians were negotiating in a language with which they were neither fluent nor conversant, and were at the mercy of non-Indian negotiators who were experienced both in business and in negotiating. *Id.* The Indians relied – at their peril – upon interpreters who were paid by the government, and in the case of the Yankton Sioux Tribe, interpreters who were promised choice land if the Tribe could be convinced to go through with the surplus land sale. JA 187-88. In particular, the Yankton Sioux Tribe was approached to sell their surplus lands at a time when

drought and grasshoppers had devastated their crops, and were extremely vulnerable to promises of what was for them, large sums of money. JA 576-77.

This Court's precedents properly require that ambiguities which arise in such a situation be resolved in favor of the Indians. *Hagen*, 510 U.S. at 411. We submit there are no ambiguities here – that Congress clearly did not intend to terminate the Yankton Reservation through the 1894 Act. But even if some doubts were to exist regarding Congress' intent, those doubts could not lead to a finding of disestablishment. Such a finding is proper only where the State meets its unambiguous burden of demonstrating congressional intent to terminate the Reservation. That burden has not been satisfied here.

V. THE "ALMOST INSURMOUNTABLE PRESUMPTION" OF DISESTABLISHMENT RELIED UPON BY THE STATE DOES NOT APPLY IN THIS CASE.

Not being able to demonstrate compelling and substantial evidence of a Congressional intention in 1894 to terminate the Reservation, the State seeks to prevail by reversing the normal presumption of continuation of reservation status, replacing it with a presumption of reservation termination. It attempts this by using the "cession" and "sum certain" language in the 1894 Agreement.

Under this Court's precedents, no such presumption flows mechanically from the mere presence of two brief clauses in a surplus land Act, irrespective of the remainder of the Act, the legislative history, and the relevant surrounding circumstances. A mechanical rule of that kind would conflict with the Court's repeated admonitions that disestablishment and diminishment cases must

be decided on the basis of Congress' actual intent when enacting the relevant surplus land Act.

The presumption invoked by the State is described in *Solem*. In order for it to arise, language conveying reservation land at a set price *must be* coupled with further "statutory expression of Congressional intent to diminish." *Solem*, 465 U.S. 470-71. If the only language in the Act relevant to Congressional intent is the language of cession and sum certain, and if there are no contrary indications in the legislative history and surrounding circumstances, it may then be proper to employ a presumption of diminishment. *Id.* But such a presumption is improper when the language of the Act, the legislative history, and the historical context indicate, as they do in this case, the strong probability that Congress ***did not*** intend disestablishment. Here, as we have shown in this brief, and as the Eighth Circuit held, all signs point toward an intention and understanding on the part of both the Tribe and the United States that the Reservation was to continue.

To employ a presumption of disestablishment in that situation would be to abolish – indeed to reverse – the rule that those challenging the continuation of reservation status have the burden of demonstrating termination by clear and convincing evidence. It would also reverse the time-honored rule that ambiguities in statutes and agreements involving Indians are to be ***resolved in favor*** of the Tribes, and not against them. *See Hagen*, 510 U.S. at 411.

CONCLUSION

The decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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